

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEWON JERMINE WILLIAMS,

Defendant-Appellant.

---

UNPUBLISHED

December 11, 2003

No. 241427

Oakland Circuit Court

LC No. 01-179195-FC

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for first-degree premeditated murder, MCL 750.316, first-degree felony murder, MCL 750. 316, felon in possession of a firearm, MCL 750.224f, and three counts felony-firearm, MCL 750.227b. The trial court sentenced defendant to life in prison for first-degree premeditated and first-degree felony murder, two to five years for felon in possession of a firearm, and two years for the three counts felony-firearm. We affirm in part and remand for modification of the judgment of sentence.

I. Prosecutorial Misconduct

Defendant raises several unpreserved claims of prosecutorial misconduct. As this Court explained in *People v McLaughlin*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 234433, issued 9/25/03), slip op at 4:

Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture under the plain error rule, the defendant must demonstrate that: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected the defendant's substantial rights. *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement requires a showing of prejudice, meaning that the error must have affected the outcome of the lower court proceedings. *Schutte, supra* at 720. If the defendant satisfies these three requirements, this Court must then exercise discretion in deciding whether to reverse. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Defendant contends that the prosecutor denied him a fair trial by misstating the definition of reasonable doubt during his closing argument.<sup>1</sup> Viewed in context of the defendant's closing arguments, the prosecutor merely continued, expanded on, and responded to defense counsel's contention that reasonable doubt is a function of common sense. The prosecutor's remarks did not constitute an attempt to distort or lower the burden of proof. Further, were we to find any error, the trial court's careful and comprehensive jury instructions on the reasonable doubt standard cured any error. See *People v Grayer*, 252 Mich App 349, 357-359; 651 NW2d 818 (2002). The trial court also carefully and explicitly explained that the lawyers' arguments are not evidence. These instructions were sufficient to cure any alleged prejudice. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).<sup>2</sup>

In his Standard 11 brief, defendant also argues that the prosecutor argued facts not in evidence. During closing arguments, the prosecutor said, "If only you could match that gun between the shell casing and the bullet found from the victim. Lo and behold, you got that in this case, ladies and gentlemen." At trial, a firearm expert testified that the shell casing was definitely fired from the gun turned over to the police. He further testified that, while the bullet was too mutilated to match it exactly to the gun, it was consistent with the class and characteristics of the gun and was very similar to his test shots. The prosecutor is free to argue all reasonable inferences from the evidence as they relate to his theory of the case. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003), quoting *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Here, the prosecutor made the reasonable inference that the bullet came from the gun. Thus, the prosecutor's remarks did not constitute misconduct. *Id.*

Defendant also claims that the prosecutor improperly vouched for and bolstered the credibility of his witnesses.<sup>3</sup> Here, the prosecutor did not imply that he had some special knowledge of the witnesses' truthfulness. In fact, the prosecution made no comments about his personal beliefs or knowledge regarding the truthfulness of these witnesses. Rather, the prosecutor simply asked the jury to consider the credibility of the witnesses when they worked

---

<sup>1</sup> In evaluating a prosecutor's remarks for potential misconduct, we examine the record and evaluate the remarks in context. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). We also consider the comments in light of defendant's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

<sup>2</sup> Defendant raises an ineffective assistance of counsel claim in connection with this claim of prosecutorial misconduct. Because the prosecutor's statements were not misconduct, any objection or motion by defense counsel would have been futile. It is not ineffective assistance of counsel to refuse to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002), quoting *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

<sup>3</sup> A prosecutor cannot vouch for the credibility of his witness by implying that he has some special knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But a prosecutor may comment on his own witness's credibility during closing, especially when there is conflicting evidence and the question of defendant's guilt turns on which witness the jury believes. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992).

through the contested events of the day of the murder. These statements do not constitute misconduct. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992).

Defendant claims the prosecutor made an improper civic duty argument.<sup>4</sup> The prosecutor told the jury that, regardless whether the crime happened in a drug-infested part of the city, the justice system works the same way for those living in less crime-ridden areas. Evidence showed that the crime occurred in a known drug house, that the victim and defendant fought before the shooting, and that the victim had alcohol, Valium, and cocaine in his system when he died. The prosecutor properly attempted to persuade the jury to focus on the law, rather than on a possible distaste for the people involved in the case. These statements were a fair comment on the evidence and the prosecution's theory of the case.<sup>5</sup> *People v Bahoda*, 448 Mich 261, 282-283, 286; 531 NW2d 659 (1995).<sup>6</sup>

## II. Double Jeopardy

Defendant argues that his conviction of both first-degree premeditated and first-degree felony murder for the same victim violated his right against double jeopardy. The prosecutor concedes this point, and we agree. Convictions for both first-degree felony murder and first-degree premeditated murder for the death of the same victim violates double jeopardy. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Because defendant was convicted of both crimes for the murder of one victim, his conviction violates double jeopardy. *Id.* Accordingly, we remand this case to the trial court to modify defendant's judgment of conviction and sentence to specify that defendant's conviction is for first-degree murder that is supported by two alternate theories. *Id.* at 588. Further, a court can convict a defendant for only one charge of felony firearm for each convicted felony. *People v Harding*, 443 Mich 693, 716-717; 506 NW2d 693 (1993). The elimination of the separate first-degree felony murder conviction means that there is one less predicate felony and therefore, one count of felony firearm must be vacated on remand. *Id.*

## III. Directed Verdict

---

<sup>4</sup> Prosecutors should not appeal to the fear and prejudice of a jury through a civic duty argument, nor should they express personal opinions on the defendant's guilt. *Bahoda, supra*, 448 Mich 282-283. But a prosecutor is given great latitude to argue the evidence and all inferences relating to his theory of the case. *Id.* at 282. The comments must be judged in context of both the prosecution's and defense's theories. *Id.* at 283, 286.

<sup>5</sup> Moreover and, as stated, reversal based upon a unpreserved claim of prosecutorial misconduct is only warranted where a curative instruction could not have alleviated the prejudicial effect. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). The trial court carefully and explicitly instructed the jury that it is required to decide the case only on the evidence and that the lawyer's arguments are not evidence. *Green, supra*, 228 Mich App 693.

<sup>6</sup> Defendant contends that trial counsel was ineffective for failing to object to the alleged prosecutorial misconduct. The prosecutor's challenged comments were not misconduct and any objection by trial counsel to the valid arguments would have been futile. Counsel is not ineffective for refusing to make a futile objection. *Milstead, supra*, 250 Mich App 401.

In his Standard 11 brief, defendant claims that the trial court erred when it denied his motion for directed verdict on the first-degree premeditated murder charge.<sup>7</sup> Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the prosecutor proved first-degree premeditated murder beyond a reasonable doubt. On the premeditation element, ample evidence showed that there was a significant amount of time for defendant to take a ‘second look’ at his actions. See *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971).<sup>8</sup> On the malice element, defendant used a deadly weapon, a gun, to kill the victim. Defendant also forced entry to the apartment in order to confront the victim. The facts and circumstances of this case are clearly sufficient for a reasonable juror to infer malice. *Carines, supra* at 759.

#### IV. Photographs

Defendant asserts that the trial court abused its discretion by admitting gruesome photos of the victim.<sup>9</sup> Judging the admissibility of photos is a two-step process. First, we must determine if the evidence is relevant under MRE 401. Second, if the photos prove relevant, we must determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice pursuant to MRE 403. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909, modified on other grounds, 450 Mich 1212 (1995). If the photos meet this test, they were properly admitted. *Id.*

The photos were clearly relevant. The death of the victim is a fact of consequence and an element of the crime charged in this case. MCL 750.316. The photos showed the crime scene as found by the police, the positioning of the body, and the location and type of wound. All of these are facts of consequence. *Mills, supra*, 450 Mich 69-71. *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). The photos were also relevant to support a witness’ testimony, her version of the events, and her credibility. *Mills, supra*, 450 Mich 69, 72-74. Further, the probative value of the photos was not substantially outweighed by the danger of unfair prejudice.

---

<sup>7</sup> A denial of a motion for directed verdict is reviewed de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). We review the evidence in a light most favorable to the prosecution and decide if a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *People v Burgenmeyer*, 461 Mich 431, 434; 606 NW2d 645 (2000).

<sup>8</sup> Indeed, between the initial confrontation and the subsequent shooting, the victim and his friend had time to smash defendant’s car, walk to the store to buy wine, walk to the victim’s house, discuss the dangers in staying there, leave the victim’s house, walk to a neighbor’s house, drink the wine, and fall asleep. Between the altercation and the shooting, defendant had time to locate a weapon, go to the victim’s house, throw rocks at the house, walk to neighbor’s apartment, yell up and demand entry to the apartment, and break into the apartment in order to find the victim.

<sup>9</sup> Admission of photographs into evidence is reviewed for abuse of discretion. “However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime.” *People v Ho*, 231 Mich App 178, 187-188; 585 NW2d 357 (1998).

*Mills, supra*, 450 Mich 66. The photos are not overtly gruesome and they contain very little blood or other detail. Any possible prejudice to defendant does not substantially outweigh the probative value of the photos. Therefore, the trial court did not abuse its discretion by admitting them. *Id.* at 79.

#### IV. Ineffective Assistance of Counsel

Defendant asserts that his counsel was ineffective. Defendant did not move for a *Ginther*<sup>10</sup> hearing or a new trial. Therefore, appellate review is precluded unless the record contains sufficient detail to support defendant's claim. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Our review is limited to mistakes apparent in the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

Defendant contends that counsel was ineffective for failing to investigate, interview witnesses and present evidence supporting a theory of manslaughter. Defendant's claim is without merit because the record reflects that defendant specifically instructed defense counsel not to present a manslaughter theory. Defendant may not create and harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), citing *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995) (further citation omitted). Defendant's approval of this course of action constitutes a waiver and extinguishes any error. *Carter, supra*, 462 Mich 216.<sup>11</sup>

#### V. Sentences

Defendant argues that two of his sentences violate the constitution because they constitute determinate sentences. Defendant failed to object to the sentences below. We review unpreserved constitutional claims for plain error affecting substantial rights. *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003).

Defendant says that his two-year sentence for felony firearm is unconstitutional because it is determinate. This Court has specifically held that such a sentence is constitutional. *People v Cooper*, 236 Mich App 643, 664; 601 NW2d 409 (1999). Defendant also contends that his life sentence without the possibility of parole is unconstitutional because it is determinate. This Court has also specifically ruled that life sentences without the possibility of parole are constitutional. *People v Snider*, 239 Mich App 393; 608 NW2d 502 (2000).

Finally, defendant claims that his sentence of life in prison without parole constitutes cruel and unusual punishment. Specifically, defendant contends that the sentence is unusual because he will die in jail. Our Supreme Court addressed this issue in *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976), and held that life sentences without possibility of parole

---

<sup>10</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>11</sup> We further note that the record does not include information on what counsel investigated or which witnesses he interviewed. Thus, defendant is not entitled to relief. *McCrady, supra*, 213 Mich App 478-479.

do not constitute cruel and usual punishment. *Id.* at 658. Therefore, defendant's sentence does not constitute cruel and unusual punishment. *Id.* at 658.

Affirmed in part and remanded for modification of defendant's judgment of sentence to specify conviction for first-degree murder supported by two alternate theories and to vacate one felony-firearm count.<sup>12</sup> We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Jane E. Markey

/s/ Patrick M. Meter

---

<sup>12</sup> We reject defendant's claim that the trial court lacked jurisdiction because the criminal complaint was never signed. The complaint was clearly signed by a complaining witness, assistant prosecuting attorney, and a clerk or magistrate.

Defendant's claim that he was denied a fair trial due to cumulative error is also without merit. Because we found no errors with regard to any of the above issues, except with respect to the first-degree murder convictions, we reject defendant's claim. *Mayhew, supra*, 236 Mich App 128.